SUPREME COURT OF THE UNITED STATES

NO. 78[illegible] 190

W. H. HOFFMAN, D. A. KELLEY,
ROBERT H. ROGERS ET AL, Appellants,

v.

PETER McCLELLAND, Jr., J. M. McCORMICK,
F. M. ETHERIDGE ET AL, Appellees.

BRIEF FOR APPELLEES.

MARSHALL SURRATT, Waco, Texas;
FRANCIS MARION ETHERIDGE, Dallas, Texas;
JOSEPH MANSON McCORMICK, Dallas, Texas;
Solicitors for Peter McClelland, Jr., et al., Appellees.

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SUPREME COURT OF THE UNITED STATES

NO. 783.

W. H. HOFFMAN, D. A. KELLEY,
ROBERT H. ROGERS ET AL, Appellants,

v.

PETER McCLELLAND, Jr., J. M. McCORMICK,
F. M. ETHERIDGE ET AL, Appellees.

BRIEF FOR APPELLEES.

POINT I.

The district court denied appellants leave to file their proffered bill of intervention (Record 145 to 151) solely on the ground that it had no jurisdiction to entertain it (Record 157 and 158), and the question of jurisdiction alone is open to examination here.

AUTHORITIES.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429;
Hennessy v. Richardson Drug Co., 189 U. S. 25.

POINT II.

The district court was without jurisdiction to entertain appellants' proffered bill of intervention.

AUTHORITIES.

Montgomery v. McDermott et al., 99 Fed. 502, S. C. 103. Fed. 801;
Case v. Beauregard, 101 U. S. 688;
Hoffman et al. v. Rose, 217 S. W. 424.

ARGUMENT.

Appellants' proffered bill of intervention (Record 145 to 151) affirmatively shows that appellants, Hoffman, Kelley, Rogers, Herring, and appellee, Rose, are citizens of McLennan County, Texas; and that appellees, Etheridge and McCormick, are citizens of Dallas County, Texas, and that appellants, Laura Belle Bagby and W. H. Bagby, and appellee, McClelland, are citizens of Los Angeles County, California. There is, therefore, no diverse citizenship.

Appellants' proffered bill of intervention does not set up any federal question. Therefore, if appellants' proffered bill of intervention be deemed an original bill, clearly the district court was without jurisdiction to entertain it. Appellants, however, contend that the properties involved in the old case, No. 8 in Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, in the trial court were in the custody of that court, and that they had a lien upon some of the properties involved in that suit, and that, therefore, their proffered bill of intervention is ancillary, and not original;

whereas appellees' contention is that appellants' proffered bill of intervention affirmatively shows that appellants had been solemnly adjudicated by the Texas courts to have no lien, and that they are merely seeking to relitigate in the federal court that which they had litigated in the state court and which the state court had solemnly adjudicated against them.

The said proffered bill of intervention, by express reference in paragraph IV thereof (Record 147), incorporates therein and makes a part thereof the decision of Hoffman et al. v. Rose by the Court of Civil Appeals of Texas, as reported in 217 S. W., pp. 424 to 428. That decision affirmatively discloses that appellants obtained a judgment by default upon substituted service against appellee, Peter McClelland, Jr., in the state district court for $7,567.54, with a foreclosure of an attachment lien on Lots 1, 2, 3 and 4 in Block 6 in the City of Waco, McLennan County, Texas; that appellants caused an order of sale to be issued upon said default judgment and to be placed in the hands of the sheriff, and that the sheriff was proceeding to execute the same by a sale of said lots thereunder, and that appellee, Rose, as trustee, on May 31, 1916, sued out an injunction in said state district court restraining said sheriff and appellants from making the threatened sale. That injunction was perpetuated, and appellants appealed to the Court of Civil Appeals, which affirmed the decree on the ground that appellee, Peter McClelland, Jr., against whom the said default judgment was rendered, owned no such interest in the lots in question as was subject to attachment, and that appellants did not acquire any lien whatsoever on said lots by virtue of

the levy of the attachment and the default judgment purporting to foreclose the purported attachment lien. The proffered bill of intervention further shows, in paragraph IV thereof (Record 147), that appellants applied to the Supreme Court of Texas for a writ of error to review the said judgment of the said Court of Civil Appeals, and that their application was refused. It, therefore, affirmatively appears from appellants' proffered bill of intervention that the Texas courts, from the lowest to the highest, having jurisdiction of the parties and the subject matter, had solemnly adjudged appellants to have acquired no lien, and that they had been perpetually enjoined from any attempt to make any sale under their aforesaid default judgment purporting to foreclose the purported attachment lien.

Paragraph V of appellants' proffered bill of intervention (Record 147 and 148) avers that "said State Courts, deny to these intervenors the enforcement of their said judgment **'during the lifetime** of said Peter McClelland, Jr.' ". The same averment is made in paragraph VI thereof (Record 148). Such averment is without foundation in fact and is contradictory of the adjudication made by the state court. The injunction issued by the state court, at the instance of Rose, Trustee, against appellants and the said sheriff, which was perpetuated and its perpetuation approved by the Supreme Court of Texas, was comprehensive, wholly without reservation, and is such as to preclude the possibility of any contention by appellants that they acquired any sort of lien or right whatsoever in virtue of their purported attachment proceedings either "during the lifetime" or **after the death** of said Peter McClelland, Jr.

In Montgomery v. McDermott, *supra*, Judge Coxe pertinently said:

> "If no attachment had been issued in the action at law it is manifest that there would be nothing on which to base the action in equity. It is only because of the lien alleged to have been acquired that the aid of equity is invoked. If the complainant had no lien there is nothing for equity to aid. The mere fact that an attachment issued is of no consequence unless it fastened itself upon some property of the defendant and impounded it so that the plaintiff could reach it if he obtained a judgment. The state court has decided that the attachment was inoperative in that it gave the complainant no lien, and this court has decided that none of the parties to the action in the state court can relitigate that question. As to them it is a closed book, the estoppel is complete."

Again Judge Coxe said:

> "The theory of the bill, as before stated, is that the complainant needs the assistance of a court of equity to enforce his lien; there being no lien, there is nothing which a court of equity can aid, it is without jurisdiction."

Again Judge Coxe said:

> "It (this action) rests upon the foundation that, irrespective of the citizenship of the parties, the court has obtained jurisdiction of the subject of the litigation, having acquired control of the fund in controversy in an action at law in which further proceedings are impossible. This is the cause of action presented by the bill and on this theory the demurrer was overruled. Remove the foundation on which it rests and the action must fall. The lien is gone, or, at least,

the complainant cannot assert its existence, and it is not easy to see how the bill can be retained or transferred so as to afford any relief to the complainant. It will hardly be maintained that this court could have obtained jurisdiction for any purpose if the suit at law had not been begun against McHenry, for the reason, among others, that no federal question is involved in the controversy between the complainant Dunning and the trustees and they are all citizens of the same state. The pendency in this court of a naked action of assumpsit which has become inoperative, does not confer jurisdiction over a subsequent action in equity relating to the same subject-matter. In brief, the court is constrained to hold that this is not an ancillary action and that no other ground of federal cognizance is stated. The bill must be dismissed."

Appellants aver in paragraph VI of their proffered bill of intervention that the properties known "as the estate of Peter McClelland, Sr., deceased", of which the lots in question are a part, have been "impounded by this court by proceedings in this cause". If the lots in question were in the custody and under the control of the court *a quo*, then the purported attachment of them by the issuance of a writ of attachment out of the state court and the levy thereof at the instance of appellants was contemptuous and in disregard of the alleged fact that said lots were in *custodia legis*, and appellants could not acquire a lien on said lots by such contemptuous levy.

It is therefore respectfully submitted that, from any view of the cause, the irresistible conclusion is that appellants acquired no lien whatsoever upon said lots and that therefore they could not maintain their proffered bill of intervention as an ancillary proceeding, and that,

as an original proceeding, the trial court had not jurisdiction because of the absence of any federal question and the lack of diverse citizenship. It is therefore respectfully submitted that the trial court had not jurisdiction to entertain appellants' proffered bill of intervention, and that the judgment should be here affirmed.

POINT III.

The lots appellants attempted to sell, in pursuance of their default judgment purporting to foreclose an attachment lien, were not in the custody and control of the trial court.

AUTHORITIES.

Hart v. Sansom, 110 U. S. 151.

ARGUMENT.

The old suit, No. 8 In Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, had terminated by a final decree rendered on February 27, 1914, (Record 45 to 49) and by a supplemental decree rendered March 4, 1918, (Record 132 to 143) against additional parties who sought to relitigate the question in the state court. Rose was appointed by the state court, not by the federal court, as a substitute trustee to succeed Prather, the last surviving trustee of the testator's selection (Record 16 to 20), and the trial court had no property of the testator, Peter McClelland, Sr., in its custody, nor was it, through Rose, as substitute trustee, or other-

wise, administering any of such property. These facts are manifest from an inspection of said decrees and from the reported decisions of the Circuit Court of Appeals in the previous litigation relative to the construction of the will of Peter McClelland, Sr., 208 Fed. 503; 222 Fed. 67; 247 Fed. 721, Certiorari denied, 241 U. S. 668.

The fact that the decree of February 27, 1914, ordered an accounting and appointed A. P. McCormick, Esquire, commissioner to take and report such accounting (Record 48), and the further fact that, by the supplemental decree of March 4, 1918, (Record 143) jurisdiction was retained for the purpose of the accounting provided for by the previous decree, are wholly immaterial because the order for an accounting cannot be tortured into the equivalent of seizing or taking the property into custody or of administering the same; and, because, presumably, such accounting was long since had, or rendered unnecessary by a voluntary and satisfactory accounting by the trustee. At all events, there is no allegation in appellants' proffered bill of intervention to the effect that such accounting had not long since been made (Record 145 to 151).

The further fact that the supplemental decree of March 4, 1918, provided that Rose, as substitute trustee, might, without further order of the court, make from time to time such advances to Peter McClelland, Jr., not to exceed the net income of the estate, as he might think right and proper, but that no portion of the *corpus* of the said estate should be surrendered to him during his life-

time, or to his vendees, except upon the further order of the court, is but a mere construction of the terms of the will of Peter McClelland, Sr., and is in no sense the equivalent of the seizure, custody or administration of the property by the trial court. The previous litigation was between Peter McClelland, Jr., as plaintiff, and Rose, trustee, and certain individuals composing the class denominated by the testator as "my heirs at law" as defendants. The collateral heirs, those designated by the testator as "my heirs at law", were claiming that upon the death of Peter McClelland, Jr., they would take, whereas Peter claimed that the executory devise to the collateral heirs was upon a contingency that could never happen and that they therefore had no interest in the estate of the testator, either under the will or under the statute, and that, subject to the trust, he was the sole beneficial owner. That litigation had terminated long prior to the time appellants sought leave to file their proffered bill of intervention, by the decree of February 27, 1914, (Record 45 to 49) and by the supplemental decree against additional members of the class known as "my heirs at law" rendered March 4, 1918 (Record 132 to 143), by which it was finally and conclusively adjudged that the collateral heirs of the testator took no interest whatsoever. The original litigation involved only this, nothing more. It was an action in equity by Peter McClelland, Jr., against Rose, trustee, and the collateral heirs of the testator to remove the cloud cast by the claim of the collateral heirs. It was therefore an action purely *in personam* and not *in rem*. Hart v. Sansom, *supra*. It

was not an action in which a fund was brought into court for administration and distribution among creditors, nor one for the use and benefit of creditors or third persons; and, insofar as strangers thereto, in which category are appellants, are concerned, that litigation was finally closed, and there was no suit pending in which appellants could intervene at the time they attempted to do so.

Even if the original suit, No. 8 In Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, were pending, and even if in that suit the trial court had custody of the property of the testator, Peter McClelland, Sr., that would not aid appellants because, having been adjudged by the state courts to have no lien, their proffered bill of intervention could not be ancillary, and the trial court had no jurisdiction to entertain it.

It is therefore respectfully submitted that the decree of the trial court should be affirmed.

MARSHALL SURRATT, Waco, Texas;
FRANCIS MARION ETHERIDGE, Dallas, Texas;
JOSEPH MANSON McCORMICK, Dallas, Texas;
Solicitors for Peter McClelland, Jr., et al., Appellees.